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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1941

No. 498

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POL-REI

GEORGE POLAKOFF AND WILLIAM ALBERT,
Petitioners,

vs.

THE UNITED STATES OF AMERICA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

IRVING SPIELER,
Counsel for George Polakoff;
LOUIS HALLE,
Counsel for William Albert.

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GEORGE POLAKOFF AND WILLIAM ALBERT,
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vs.

THE UNITED STATES OF AMERICA.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

To the Honorable Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

Your petitioners, George Polakoff and William Albert, pray that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Second Circuit entered in the above entitled cause on July 14, 1941, affirming the convictions of your petitioners in the United States District Court for the Southern District of New York.

Opinion Below.

The opinion of the court below (R. 175-179) has not yet been reported.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on July 14, 1941 (R. 179). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

Questions Presented.

1. Whether the attempted persuasion of an Assistant United States Attorney, constitutes a corrupt endeavor to influence an officer of a court of the United States within the meaning of Section 135 of the United States Criminal Code.

2. Whether a conspiracy to commit a substantive offense (Title 18, U. S. C. Section 241) which is in its very nature "an attempt", constitutes an indictable offense.

Statutes Involved.

The statutes involved, Title 18, U. S. Code, Sections 88 and 241, are as follows:

Title 18, Section 88, United States Code:

(Criminal Code, Section 37.) Conspiring to commit offense against United States.—If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both. (R. S. Section 5440; May 17, 1879, c. 8, 21 Stat. 4; Mar. 4, 1909, c. 321, Section 37, 35 Stat. 1096.)

Title 18, Section 241, United States Code:

(Criminal Code, Section 135.) Attempting to influence witness, juror, or officer.—Whoever corruptly,

or by threats or force, or by any threatening letter or communication, shall endeavor to influence, intimidate, or impede any witness, in any Court of the United States or before any United States Commissioner or officer acting as such Commissioner, or any grand or petit juror, or officer in or of any Court of the United States, or officer who may be serving at any examination or other proceeding before any United States commissioner or officer acting as such commissioner, in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due administration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both. (R. S. Secs. 5399, 5404; Mar. 4, 1909, c. 321, Sec. 135, 35 Stat. 1113.)

Statement.

The petitioners were indicted for conspiracy to obstruct justice by attempting to influence an Assistant United States Attorney in his recommendation of a sentence to the district judge in the case of one Sidney Kafton (R. 9-12). Petitioners were found guilty by the jury (R. 147) and each was sentenced to two years' imprisonment (R. 13-16). The petitioners were tried upon the same charge on two previous occasions. The first trial resulted in a disagreement (R. 4). After a second trial the petitioners were convicted, but, upon appeal, a new trial was ordered because evidence improperly secured had been admitted. (112 F. (2d) 888, certiorari denied 61 S. Ct. 41.)

Kafton and his brother-in-law, Harry Goldfarb, had been indicted for narcotic offenses (R. 20). Both of these men were confirmed criminals and had criminal records. Kafton, while serving in the United States Navy, had been courtmartialed and sentenced to imprisonment for a term of five years (R. 48). In 1920, he had pleaded guilty to the

crime of attempted grand larceny (R. 48). He sold narcotics for a year and a half (R. 50) which led to his arrest and indictment. Kafton was also convicted in Putnam County, New York, for the crime of malicious mischief based upon a charge of "rifling of telephone boxes" (R. 52). Goldfarb's criminal record included, besides his indictment with Kafton on the narcotic charge, a plea of guilty to an indictment for forgery (R. 77).

After Kafton's release on bail on the narcotic charge in the federal court, he surrendered to the Putnam County authorities and began serving his sentence for malicious mischief and disorderly conduct (R. 25). While in Putnam County jail he was visited by a United States Government agent (R. 52), and agreed to become an informer for the Government at the end of his sentence on the malicious mischief charge (R. 56). He was released from the Putnam County jail on September 22, 1939 (R. 52).

Actually, therefore, and prior to the inception of this case, Kafton was hired as an informer for the Government and had already been promised consideration for his services to the Government (R. 53). Kafton understood by the promises he received from the Government that sentence upon the narcotic charges would be suspended (R. 53, 67, 69). He, of course, knew that the petitioners could be of no help to him.

The petitioners were engaged in the bonding business (R. 126; Ex. 1, R. 150) and have never been convicted of any crimes. According to the testimony of Kafton, the petitioner, Albert, suggested to Kafton that for a sum of money he could secure a low sentence for him (R. 29). Kafton, instead of disregarding this idle boast, reported the incident to the Narcotics Bureau (R. 30). Kafton was told to "go ahead" (R. 64) and events following were the result of a plan by Kafton and Government officials to incriminate the petitioners.

Kafton allegedly continued these negotiations with Albert, finally stating to the petitioner, Albert, that he could not raise $750, the sum requested by Albert, but that he might possibly obtain $500 (R. 33).

These transactions between Kafton and the petitioner, Albert, of course did not, by themselves, constitute the alleged ultimate criminal acts. This is admitted by the Circuit Court of Appeals in its opinion (Opinion, R. 179).

However, it was the theory of the prosecution that the petitioner, Polakoff, in the meantime was attempting to influence the Assistant United States Attorney in charge of the Kafton case to recommend a reduced sentence and to bring it before a certain Judge who would probably reduce it still more, following his custom with respect to the prosecutor's recommendations. Under the decision of the Circuit Court of Appeals, the Court below held that the conduct of the petitioners, Albert and Polakoff, came within the condemnation of Section 135 of the United States Criminal Code when the petitioner, Polakoff, attempted "false persuasion" (Opinion, R. 179).

In view of the significance of the discussions between the Assistant United States Attorney and the petitioner, Polakoff, the evidence in connection therewith shall be stated in greater detail.

The Assistant United States Attorney in charge of the Kafton case was one Edward J. Behrens (R. 85). The petitioner, Polakoff, had known the Assistant United States Attorney socially, and the latter and his wife had been entertained by the petitioner, Polakoff, and his wife before any matters connected with this case arose (R. 87-88).

Mr. Behrens testified that it was not unusual for lawyers to talk to him about what his recommendations would be in cases of a plea of guilty (R. 100). He admitted that many people customarily came into his office on various occasions about various cases and asked him what his

recommendation would be in criminal cases handled by him (R. 100).

Mr. Behrens knew that Kafton was working as an informer for the Government (R. 99).

The petitioner, Polakoff, first approached Mr. Behrens during the week of October 9th, and simply inquired whether Kafton would receive consideration if he pleaded guilty (R. 89). According to Mr. Behrens, petitioner, Polakoff, gave as an excuse for making this inquiry the fact that he wanted to clean up all the cases where he had written bail for defendants (R. 89). Behrens, answering the inquiry of Polakoff, pretended that he was not interested in whether Kafton stood trial or pleaded guilty and stated that he would look through the files of the Kafton case (R. 89).

On two or three subsequent occasions, upon inquiries made by the petitioner, Polakoff, Mr. Behrens stated to him that he had not yet looked at his files (R. 90).

The petitioner, Polakoff, came to Mr. Behren's office again on either the 18th or 19th day of October, 1939, and asked Mr. Behrens whether he had had an occasion to look through the files of the Kafton case (R. 90). Mr. Behrens answered that he had, and said that he had spoken to the Narcotics Bureau and that they wanted a five-year sentence for Kafton (R. 90). Of course, Mr. Behrens knew that Kafton was an informer and apparently deliberately exaggerated the extent of the sentence which he stated the Narcotics Bureau desired in order to encourage Polakoff to incriminate himself, for by that time he had been fully apprised by Kafton and the Government officials of the statements made by the petitioner, Albert. Polakoff only remonstrated that such a recommendation was severe for a first offender and then declared that he was not interested in what the recommendation of Mr. Behrens would be, and requested that the case be placed upon the calendar for pleading before Judge Bondy (R. 90). A Clerk of the Court testified that there

was nothing unusual about advancing a case for pleading (R. 106).

Although Mr. Behrens told petitioner, Polakoff, that he would adjourn the case from the 20th to the 25th day of October, 1939, he deliberately gave instructions to have the case adjourned to November 3, 1939, beyond the period when Judge Bondy was assigned to sit (R. 91). This change in the date was called to Mr. Behren's attention by Polakoff and Mr. Behrens stated that if Kafton desired to plead guilty, the case could be added to the calendar of a prior date (R. 91).

According to the testimony of Mr. Behrens, the petitioner, Polakoff, again came to see him on October 21st, 1939. At that time, according to Mr. Behrens, Polakoff stated that a politician was interested in Kafton and wanted to get a two-year recommendation for him (R. 92). Behrens merely answered that he was sorry but that the Narcotics Bureau wanted five years "and five years it was" (R. 92). Mr. Behrens testified that he saw the petitioner, Polakoff, again on October 24th, 1939. Polakoff, Mr. Behrens testified, merely inquired whether he had thought the Kafton case over during the week-end. Mr. Behrens answered that he had and that "the Bureau wanted five years and that was the end of it" (R. 93).

The petitioner, Polakoff, made no attempt to influence Mr. Behrens and presented legitimate arguments why he believed the recommendation to be severe (R. 93). Polakoff remarked that it was puzzling to him for the Narcotics Bureau to make such a recommendation for a man charged with his first offense in violating the Narcotics laws (R. 93). He pointed to the fact that in a much more serious case the District Attorney had recommended a sentence of two years (R. 94).

Finally, on that same afternoon, Mr. Behrens, pretending that he talked to the Narcotics Bureau again, told Polakoff that they stated that any recommendation made by him would be satisfactory to the Narcotics Bureau. Mr. Behrens again pretending that he had been persuaded and apparently in accordance with the preconceived plan of the Government officials, said that he would make a recommendation for a sentence of two years (R. 95).

Kafton's case was put on the calendar for the 26th day of October, 1939 (R. 96).

Before the case was called, the petitioners were arrested and taken into custoday on the same day. No money had been paid by Kafton to the petitioners. There is no charge in this case that any Government official was bribed or that there was an attempt to bribe any Government official. The entire theory of the Government was that Polakoff, by his "discussions" with Mr. Behrens, had furnished the requisite proof that the petitioners were parties to a conspiracy to corruptly influence an Assistant United States Attorney in the performance of his duty.*

Specification of Errors to be Urged.

The Circuit Court of Appeals for the Second Circuit erred:

1. In holding that attempted persuasion by arguments was an endeavor to corruptly influence the officer of a Court of the United States or to corruptly influence or obstruct the due administration of justice within the meaning of Section 135 of the United States Criminal Code.

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* When the indictment involving Kafton and Goldfarb came up for disposition in February, 1940, apparently, in accordance with the earlier agreement made with these two self-confessed dope-peddlers and convicts, they each received suspended sentences (R. 53, 79).

2. In holding that a conspiracy to endeavor to corruptly influence an officer of a Court of the United States is an indictable offense within the terms of Section 37 of the United States Criminal Code.

3. In affirming the judgments of conviction.

Reasons for Granting the Writ.

The Circuit Court of Appeals in its opinion admits that "exact precedents appear to be lacking" and therefore, questions decided by the court below are of first impression in the Circuit Court of Appeals (Opinion, R. 177). Although there is, therefore, no conflict of the decisions, the issues are of obvious importance, as the court below also admitted in its opinion (Opinion, R. 175). The questions of federal law raised by this case have not been, and should therefore be, settled by this Court.

In our view, the decision below in the present case constitutes an unwarranted and unreasonable extension of the principles of the cases decided under Section 135 of the Criminal Code. The decision reached by the court below is so sweeping in its implications that there should be a review and determination by this Court.

Petitioners contend that the crimes charged were not proven. The petitioner Albert's alleged request for a sum of money upon a promise to obtain a low sentence for Kafton, or Kafton's promise to pay for the effort, were not the ultimate criminal acts. The petitioners were not charged with attempting to obtain money under false pretenses and the testimony of Kafton and the other witnesses, if believed, will only tend to sustain such a charge, but that is not the offense with which these petitioners have been charged. *Rosner* v. *United States*, 10 F. (2d) 675, 676. The guilt or innocence of the petitioners must necessarily depend upon the effect of the conduct of Polakoff in his

discussions with the Assistant United States Attorney, Mr. Behrens. It is our respectful submission that this conduct did not establish a conspiracy to corruptly influence an officer of a Court of the United States.

The court below, at the conclusion of its opinion (Opinion, R. 178) summarizes the scope of Polakoff's activities as follows:

> "Here Polakoff was endeavoring to persuade the Assistant District Attorney to be lenient with Kafton, for reasons falsely assigned."

The court below held that the ultimate criminal act was committed when Polakoff attempted "false persuasion" (Opinion, R. 179). It is the contention of the petitioners that the arguments of the petitioner, Polakoff, for that is all that his conduct amounted to, never reached the point of "attempted persuasion". Indeed, Mr. Behrens, the Assistant United States Attorney, testified that Polakoff finally disclaimed any intention to "persuade Mr. Behrens" to recommend a two year sentence for Kafton, for the petitioner, Polakoff, said, according to Mr. Behrens, "I don't care what you recommend; whether you recommend two years or five years, will you have it so that the hearing can be had before Judge Bondy?" (R. 102, 90). However, it is significant that the conclusion most favorable to the Government which the court below could draw from all of the evidence, was that Polakoff attempted "false persuasion".

It is the respectful submission of the petitioners that the conduct of the petitioner, Polakoff, did not reach the degree of criminality aimed at under Section 135 of the United States Criminal Code. There was concededly no attempt by petitioner, Polakoff, to bribe Mr. Behrens or to corruptly influence him. Indeed, the alleged conspiracy, as set forth in the indictment, negatives any such theory. Nothing that

petitioner, Polakoff, actually said had the tendency to corruptly influence the Assistant United States Attorney or to obstruct or impede the due administration of justice.

The following portion of the dissenting opinion of Mr. Justice Holmes in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 424, is particularly applicable to the effect of the conduct of the petitioner, Polakoff, in this case:

> "But a Judge of the United States is expected to be a man of ordinary firmness of character, and I find it impossible to believe that such a Judge could have found in any line that was printed even a tendency to prevent his performing his sworn duty."

The *Toledo* case was overruled by this Court in *Nye* v. *United States,* 61 S. Ct. 810, and the views of the dissenting justices were adopted.

What Justice Holmes wrote might be said with equal force about an Assistant United States Attorney. Paraphrasing the above quotation and applying it to the facts in the case at bar, it might also be said that it is impossible to believe that the Assistant United States Attorney could have found in anything said or done by the petitioner, Polakoff, even a tendency to prevent Mr. Behrens from performing his sworn duty.

"Attempted persuasion" is not made criminal under Section 135 of the United States Criminal Code. "Corruptly influence" as used under Section 135 of the Criminal Code, does not include or cover persuasion by argument. *City of Tecumseh* v. *City of Shawnee,* 148 Oklahoma 128, 137. Nor is alleged "false persuasion" a substantial substitute for influencing by "threats or force." *Daniels* v. *Lowery,* 92 Ala. 519, 522. And while it is true that Section 135 of the Criminal Code embraces a broad category of offenses, the conduct of the petitioners in this case does not come within the family of offenses described in that Section.

The decision of the court below introduces a new and exceedingly broad standard of guilt. The determination of the guilt or innocence of the accused resolves itself into an inquiry into the motives of the accused and the truth or falsity of the arguments or reasons assigned. If the reasoning of the court below is carried to its logical conclusion, a most extraordinary situation is reached. The Court below held that it is as "corrupt" to persuade a public officer by lies as by bribes (Opinion, R. 179). If the alleged reasons assigned by Polakoff were true and if it were a fact that Kafton's bond was written by Polakoff's company and he was trying to dispose of the case or that he (Polakoff) was indebted to a politician, then under the theory of the opinion of the Court below the "persuasion" would not amount to "corrupt influence". Under that theory, persuasion would become "corrupt influence", depending upon the state of mind of the accused. Indeed, the court below held that any misrepresentations of one's motives would be a fraud and a violation of Section 135 of the Criminal Code. Such an interpretation carries us far afield from the strict requirements of a criminal statute. Indeed, the case cited by the court below, *Marshall* v. *The Baltimore Ohio Railroad Co.*, 16 How. 314, 57 U. S. 314, which involved a civil action to recover for services rendered, demonstrates this.

Under the theory of the decision of the Court below, criminal liability would be predicated upon proof of motive regardless of the effect or tendency of the conduct of the accused. Every false argument made to an officer of a court of the United States, whether significant or insignificant, material or immaterial, could be made the basis of an indictment under Section 135 of the Criminal Code. It is indeed no compliment to officers of courts of the United States to say that they can be "corruptly influenced" by arguments. Certainly, the alleged representations made by the petitioner Polakoff were neither significant or material.

The wording of Section 135 of the Criminal Code and the cases decided under it demonstrate, we believe, that a sterner test must be applied. The conduct of the accused must actually amount to an endeavor to influence the actions of an officer of a court of the United States. Arguments, whether false or true, do not amount to corrupt influence. If the broad standard of the court below is adopted, then, the prosecutions under this Section would be without limit. Every lawyer or advocate presenting an alleged false argument or who acted in his own interest would be subjected to the penalties of this statute. The decision of the court below extending without limit the category of offenses falling under the statute calls, we believe, for review by this Court.

Another phase of this case illustrates the injustice of the verdict of guilty and affirmance of the judgment of conviction by the court below. The petitioners were indicted under the conspiracy statute (Criminal Code, Section 37; 18 U. S. C. A. 88). The sentence imposed upon the petitioners, a term of two years, is the maximum penalty under the conspiracy statute. The maximum sentence which could have been imposed for violation of Section 135 of the Criminal Code is imprisonment of not more than one year. Under the Government's theory, the substantive offense had been committed and the Government attempted to prove the alleged conspiracy by establishing elements of the substantive offense. Under the circumstances of this case, we believe that no clearer case of abuse of indictment for conspiracy has ever been presented. *Heike* v. *United States*, 227 U. S. 131, 144.

Of equal importance is the question whether a conspiracy to endeavor to commit a crime is an indictable offense. It should be noted that the substantive offense with which the petitioners were charged with conspiring to commit,

is in its very nature "an attempt." The statute is described by the reporter of the United States Code Annotated as "attempting to influence witness, juror, or officer."

It is submitted that the petitioners could not have been charged with attempting to commit the substantive offense which is itself an attempt.

"One cannot be indicted for an attempt to commit a crime where the crime attempted is in its very nature an attempt. *People* v. *Thomas,* 63 Cal. 482; 3 Am. & Eng., p. 251, note 5." *State* v. *Hewett,* 158 N. C. 627, 629.

If there can be no such crime as attempt to endeavor to commit a crime, then obviously, a conspiracy to endeavor to commit a crime is not an indictable offense, for the same reason.

Conspiracy is analogous to attempt. Wharton's Criminal Law (12th Ed.) Sec. 1607. It is a species of attempt. Bishop, Criminal Law, Sec. 191. It follows the same rules, and is subject to the same limitations, *id.*, secs. 169, 191. Conspiracy is an attempt by two persons to commit a crime. Just as in the rules applicable to the law of attempted crime, so in a conspiracy, there must be proof not only of the unlawful intent, but the commission of an act to effect the object of the conspiracy.

If there were such a crime as conspiracy to endeavor to commit a crime, the overt act would necessarily be any act tending to effectuate an endeavor which in turn would be any effort towards the commission of the crime. The overt act, then, would be remotely removed by many degrees from the actual crime.

The indictment of the petitioners under the conspiracy statute in connection with a substantive offense which is itself "an attempt" or "an endeavor," was inequitable, unjust and prejudicial to the rights of the petitioners.

Conclusion.

It is respectfully submitted that this petition for a writ of certiorari should be granted.

GEORGE POLAKOFF and
WILLIAM ALBERT,
Petitioners.

By IRVING SPIELER,
Attorney for Petitioner,
George Polakoff.
LOUIS HALLE,
Attorney for Petitioner,
William Albert.

Dated, New York, August, 1941.

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THE UNITED STATES OF AMERICA.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF.

IRVING SPIEGEL,
Counsel for Petitioner,
George Polakoff.

LOUIS HALLE,
Counsel for Petitioner,
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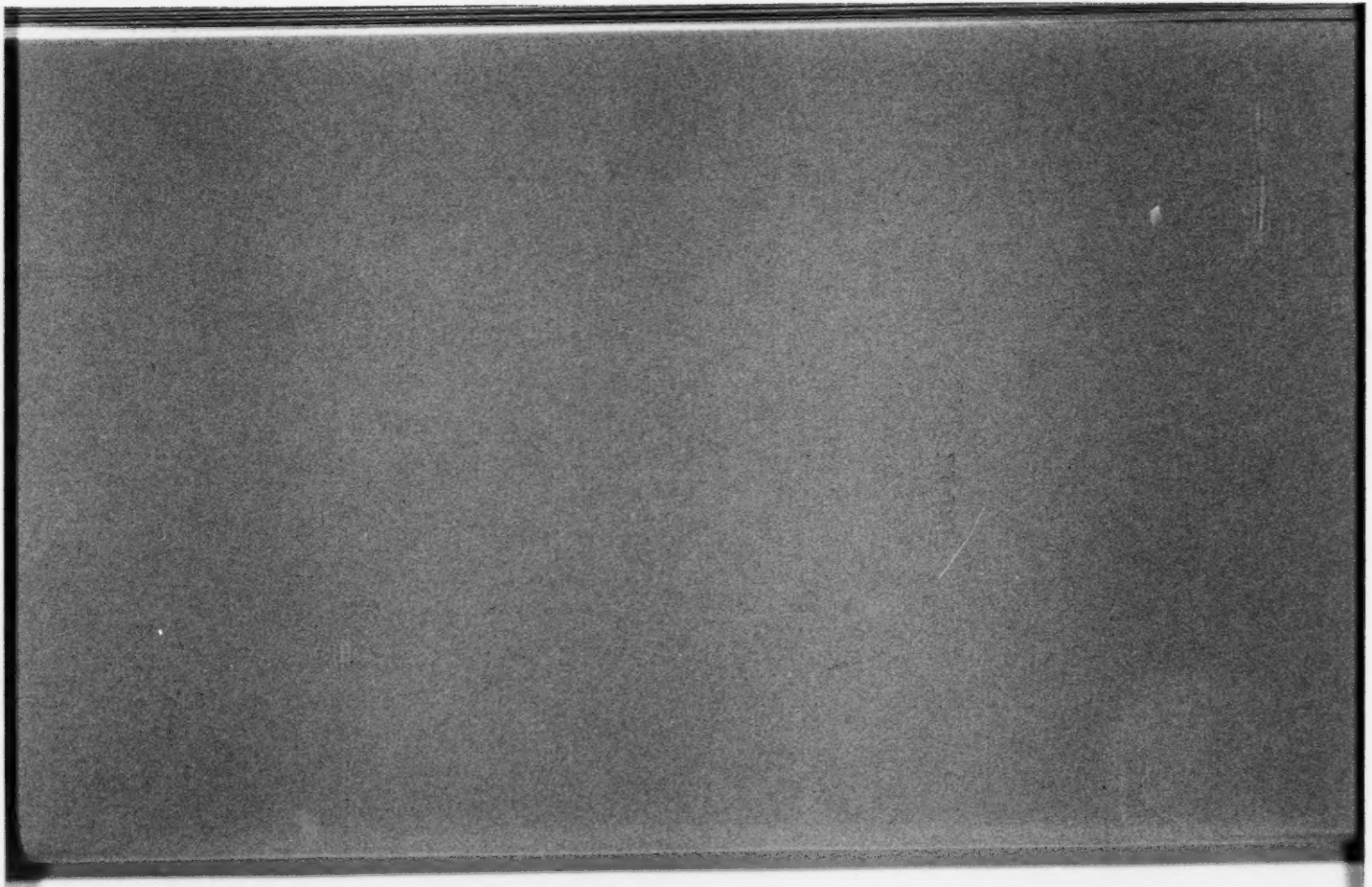

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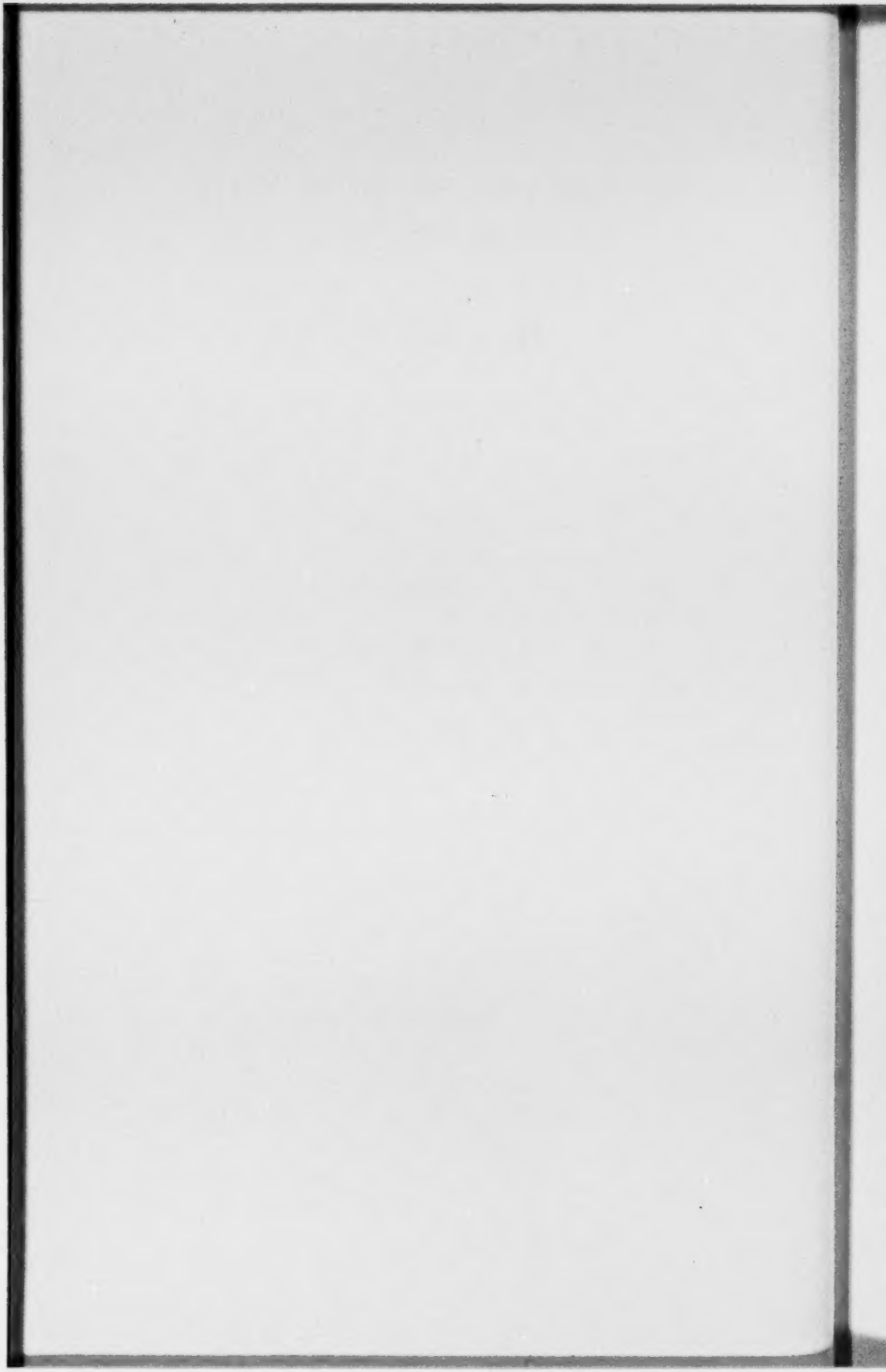

SUPREME COURT OF THE UNITED STATES

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GEORGE POLAKOFF AND WILLAM ALBERT,
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vs.

THE UNITED STATES OF AMERICA.

PETITIONERS' REPLY BRIEF.

Answering Respondent's Brief, pp. 5-8.

The brief for the United States mistakes the contention of the petitioners. The petitioners do not contend that under the pertinent portion of Sec. 135 of the Criminal Code there must be contemplated actual bribery or other corruption of an official. We concede that in some instances misrepresentation and concealment may constitute violation of Sec. 135 of the Criminal Code providing the concealment and misrepresentation relate to material facts and have the effect of influencing the official in the discharge of his duties.

Certainly the acts charged to the accused must have the effect of influencing the official in the discharge of his duties or cause the obstruction of due administration of justice. This is plain common sense and the isolated and few cases cited by the Government support this contention. We need

not speculate whether the adverb "corruptly" modifies the verb "shall endeavor" or the verb "influence".

In *Bosselman* v. *United States*, 239 Fed. 82 (cited by the Government), the defendant requested others to make erasures, changes and insertions in his books and records material to a matter under inquiry by the Grand Jury. Certainly the conduct of the defendant had the effect of obstructing and impeding the due administration of justice and it would be immaterial if the defendant did not bribe the persons to make the changes. In *Astwood* v. *United States*, 1 Fed. (2d) 639, cited by the Government, a surety on the bond of the accused induced the accused not to appear in Court in accordance with condition of her recognizance. Certainly the effect of this conduct was also to obstruct and impede the due administration of justice.

In the case at bar the petitioners are not charged with doing anything concretely that had the effect of influencing the Assistant United States Attorney or obstructing or impeding the due administration of justice. The basis of the charge against the petitioners is extracted from certain words spoken by the petitioner, Polakoff, to the Assistant United States Attorney. The Government points to two statements allegedly made by Polakoff to the Assistant United States Attorney. The first statement was to the effect that the petitioner, Polakoff, told the Assistant United States Attorney that he wanted to clean up all the cases where he had written bail for the defendants and therefore wanted to know "if this fellow Kafton pleaded guilty, if he would receive consideration" (R. 89). This statement, whether true or false, was immaterial and had no effect on the Assistant United States Attorney. The reply of the Assistant United States Attorney, which the Government does not quote, is significant. The Assistant United States Attorney stated that the man was caught red-handed and "he did not care one way or another whether he pleaded guilty or stood trial" (R. 89).

The second statement forming the basis of this charge was the alleged remark made by the petitioner, Polakoff, to the Assistant United States Attorney that his real interest in the Kafton case was that there was some local politician who was interested in Kafton and who was in a position to put men to work (R. 92). This statement, whether true or false, was immaterial and did not have the effect of influencing the Assistant United States Attorney. Here, again, the brief of the Government fails to give the answer of the Assistant United States Attorney. He said to the petitioner, Polakoff, "I told him I was sorry but that the Bureau wanted five years, and five years it was" (R. 92).

Certainly these stupid remarks of the petitioner, Polakoff, if made, could not have the effect of influencing the Assistant United States Attorney or obstructing the due administration of justice. The fact is that it did not have that effect and the Assistant United States Attorney actually paid little or no attention to these voluntary remarks.

We submit that it is impossible to believe that anyone could find anything which was said or done by the petitioner, Polakoff, which even had a tendency to prevent the Assistant United States Attorney from performing his sworn duty. See the dissenting opinions of Mr. Justice Holmes in *Toledo Newspaper Co.* v. *United States,* 247 U. S. 402, 424; *Craig* v. *Hecht,* 263 U. S. 255, 281. The reasoning in both these dissenting opinions was followed by this Court. See *Nye* v. *United States,* 61 Sup. Ct. Rep. 810.

In *Craig* v. *Hecht, supra,* Mr. Justice Holmes wrote at page 281:

> "But if there had been, and giving the most unfavorable interpretation to all that the letter says, I do not see how to misstate past matters of fact of the sort charged here could be said to obstruct the administration of justice. Suppose the petitioner falsely and unjustly charged the judge with having excluded him from knowledge of the facts, how can it be pretended that the charge obstructed the administration of justice

when the judge seemingly was willing to condone it if the petitioner would retract?"

How can it be pretended in the case at bar that the statements obstructed the administration of justice or tended to influence the Assistant United States Attorney, when the Assistant United States Attorney paid little or no attention to the remarks and insisted that he would show no leniency (R. 92)?

The Government also calls attention to the fact that the statute prohibits the influencing, obstructing or impeding the due administration of justice. Except for calling this Court's attention to this portion of the statute, no argument is presented that the act charged to petitioners have the effect of obstructing or impeding the due administration of justice. The alleged conduct of the petitioners did not entail any long delay or any large expense in the litigation. No witnesses were corrupted, no records were changed; indeed, Kafton's case was quickly disposed of.

Answering Respondent's Brief, p. 8.

The Government states that the petitioners' contention that there can be no prosecution for a conspiracy "to endeavor" to accomplish the various purposes named in this section, is unavailing. For lack of any other case, the decision of *United States* v. *Russell*, 255 U. S. 138, is cited in support of this generalization.

In *United States* v. *Russell, supra,* defendants were not indicted for a conspiracy to violate Sec. 135 of the Criminal Code. The defendants were charged with violating the substantive offense, the basis of which is "an endeavor" to corruptly influence an officer of any Court of the United States. We still contend that a conspiracy "to endeavor" to commit a crime does not constitute an indictable offense. We contend further that the use of a conspiracy statute in connection with substantive offense, which is in itself an

attempt or an endeavor, is a clear abuse of the conspiracy statute and glaringly unjust.

In the case at bar a cursory examination of the record will demonstrate that the Government attempted to establish the conspiracy by proving the substantive offense,—an endeavor to corruptly influence the action of the Assistant United States Attorney. Under the circumstances, the use of the conspiracy statute involving a punishment much more severe was unauthorized. *Clune* v. *United States*, 159 U. S. 590. Imprisonment for two years for the making of inane and inconsequential remarks, and which was treated as immaterial by the Assistant United States Attorney, is obviously cruel and inhuman punishment. The process by which such a result has been reached should be scrutinized by this Court.

Conclusion.

It is, therefore, respectfully submitted that this case is one calling for the exercise by this Court of its supervisory powers to the end that rights under the Constitution of the United States should be preserved, and accordingly a writ of certiorari should be granted and the Court should review and reverse the decision of the Circuit Court of Appeals for the Second Circuit.

GEORGE POLAKOFF and
WILLIAM ALBERT,
Petitioners,

By IRVING SPIELER,
Attorney for Petitioner,
George Polakoff.

LOUIS HALLE,
Attorney for Petitioner,
William Albert.

Dated, New York, September 1941.

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414385—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 498

GEORGE POLAKOFF AND WILLIAM ALBERT,
PETITIONERS

v.

THE UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Circuit Court of Appeals (R. 175–180) is reported in 121 F. (2d) 333.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered July 14, 1941 (R. 180). The petition for a writ of certiorari was filed August 9, 1941. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925. See also Rule XI of the Criminal Appeals Rules promulgated by this Court on May 7, 1934.

QUESTION PRESENTED

The petitioners conspired to influence an Assistant United States Attorney to recommend a lenient sentence in a federal criminal proceeding; the influence was exerted through concealment and misrepresentation but no attempt was made to bribe or otherwise to corrupt him. The question is whether the petitioners conspired, under Section 135 of the Criminal Code, corruptly to endeavor to influence the discharge of the official duties of the Assistant United States Attorney or corruptly to endeavor to influence the due administration of justice.

STATUTES INVOLVED

The pertinent portion of Section 135 of the Criminal Code (18 U. S. C., sec. 241) reads:

> Whoever corruptly, or by threats or force, or by any threatening letter or communication, shall endeavor to influence, * * * or impede any * * * officer in or of any court of the United States, * * * in the discharge of his duty, or who corruptly or by threats or force, or by any threatening letter or communication, shall influence, obstruct, or impede, or endeavor to influence, obstruct, or impede, the due ad-

> ministration of justice therein, shall be fined not more than $1,000, or imprisoned not more than one year, or both.

Section 37 of the Criminal Code (18 U. S. C., sec. 88) reads:

> If two or more persons conspire either to commit any offense against the United States, or to defraud the United States in any manner or for any purpose, and one or more of such parties do any act to effect the object of the conspiracy, each of the parties to such conspiracy shall be fined not more than $10,000, or imprisoned not more than two years, or both.

STATEMENT

Petitioners were convicted upon an indictment in one count (R. 9–12, 147–148) charging a conspiracy "corruptly to endeavor to influence, obstruct, and impede and corruptly to influence, obstruct, and impede the due administration of justice in the United States District Court for the Southern District of New York, and corruptly to endeavor to influence and impede officers in and of the United States District Court for the Southern District of New York in the discharge of their official duties" (R. 9). Each was sentenced to two years (R. 13, 15).

The uncontradicted evidence[1] shows that petitioner Albert informed one Kafton, who was under indictment in the United States District Court for

[1] Petitioners introduced no evidence in their behalf.

the Southern District of New York for narcotic violations (R. 24), that for $750 he could arrange through a third party for Kafton to receive a light sentence, i. e., a year and a day (R. 29). Kafton stated that he could get only $500 and petitioner Albert said he would find out whether the third party would accept that amount (R. 33). Petitioner Albert then negotiated an agreement with petitioner Polakoff, the third party to whom Albert had referred (R. 35–44, 75–76, 121–122), under which Polakoff for $500, agreed to get the case placed upon the calendar of a certain district judge (R. 90, 120), whose practice it was to cut approximately in half recommendations for sentences made by prosecutors (R. 41, 42, 119), and to get the United States Attorney to recommend a two-year sentence upon a plea of guilty (R. 42, 44, 122). Petitioner Polakoff next got in touch with the Assistant United States Attorney handling the case (R. 89–95) and, without attempting to bribe or otherwise corrupt him, finally managed to secure his promise to recommend a two-year sentence (R. 95) and to have the case placed on the trial calendar of the desired judge (R. 36, 120). Petitioner Albert then paid petitioner Polakoff $500 (R. 44, 75–76, 122) for "fulfilling his contract" (R. 42, 44, 122) upon the understanding with Kafton that Albert would be reimbursed if sentence were pronounced according to plan (R. 75, 123).

Petitioner Polakoff, a layman, had no legitimate interest as attorney (R. 87, 101), bondsman (R.

100), or otherwise in the Kafton case. At first he stated to the Assistant United States Attorney that he was interested in the case because "he wanted to clean up all the cases where he had written bail for defendants" (R. 89). In later attempts to influence the Assistant United States Attorney he explained that his "real interest" was that he was indebted to a local politician who was in a position to put men to work, and who was interested in Kafton and in his receiving a light sentence (R. 92, 94).

ARGUMENT

Petitioners appear to contend that under the pertinent portion of Section 135 of the Criminal Code (*supra*, p. 2) it is not an offense to endeavor to influence an Assistant United States Attorney in the discharge of his duties, unless there be contemplated the bribery or other corruption of such official.[2] If the wording were in fact as petitioners have tacitly assumed it to be throughout their petition (Pet. 8, 9, 10, 11), i. e., "Whoever * * * shall endeavor *to corruptly influence* * * * any officer * * * of any court," their construction would have rhetorical support. The actual wording, however, does not lend itself to petitioners'

[2] As indicated in the opinion of the Circuit Court of Appeals (R. 175–176), it is doubtful whether this question was raised in the trial court. Indeed, the jury was seemingly instructed, without exception on the part of petitioners, that no bribery or other corruption of the Assistant United States Attorney was required (R. 145–147).

contention. The language is: "Whoever corruptly * * * shall endeavor to influence * * * any officer * * * of any court." The adverb "corruptly" can only modify the verb "shall endeavor" and can only have been employed to characterize the intent necessary to make such an endeavor an offense under the section. Petitioners' construction would virtually narrow the clause to include only bribery cases (Pet. 10), for corruption could not often be accomplished save through some form of persuasion akin to bribery. The section has been held not to be so limited. *Bosselman* v. *United States,* 239 Fed. 82, 86 (C. C. A. 2); *Astwood* v. *United States,* 1 F. (2d) 639, 641 (C. C. A. 8); and cf. *Craig* v. *United States,* 81 F. (2d) 816, 822 (C. C. A. 9), rehearing denied, 83 F. (2d) 450, certiorari denied, 298 U. S. 690.

Petitioner Polakoff was to receive $500 for influencing the Assistant United States Attorney upon a matter resting in his official discretion. Unlike the ordinary situation of an attorney interceding in behalf of his client, Polakoff's interest in the case was not disclosed to the Assistant United States Attorney, and in explaining his interest he falsely informed the Assistant United States Attorney, first, that he was surety for Kafton and, later, that his interest arose out of his indebtedness to a politician who was interested in helping Kafton. In endeavoring to persuade the Assistant United States Attorney in Kafton's be-

half, petitioner Polakoff conveyed the impression that Kafton was to receive a job through this politician's influence. All of these representations were false and plainly of utmost materiality in effecting Polakoff's purpose, i. e., a favorable exercise of official discretion. It is hardly compatible with honesty that an official from whom a discretionary recommendation is sought should be misinformed as to the pertinent facts. Cf. *Marshall* v. *Baltimore and Ohio Railroad Company,* 16 How. 314, 335–336. The statute clearly forbids the influencing of any officer of a United States court by means of threats or force. It is not to be supposed that it was intended to permit the influencing of such an official by misrepresentation or concealment. The word "corruptly" seems plainly to contemplate such methods, as well as actual bribery or like corruption. In *Craig* v. *United States,* 81 F. (2d) 816, 822 (C. C. A. 9), *supra,* the material facts in which are analogous, the court said: "* * * influence may be corruptly exerted upon public officials by means other than political pressure, money, or 'other things of value.' In a government of laws and not of men, motives of personal favoritism, on whatever grounds such motives may be based, are to be deemed corrupt in the administration of public justice."

In addition to the offense of corruptly influencing an official of a United States court, to which petitioners specifically direct their argument, the

statute involved creates the offenses, also charged as objects of the conspiracy in the instant case, of corruptly influencing, obstructing or impeding and endeavoring to influence, obstruct or impede the due administration of justice. Petitioners' contention that the statute only denounces activity akin to bribery finds even less support with respect to offenses of the character specified since it is obvious that in their commission no official corruption need necessarily be involved. Petitioners are in no position to complain if any one of the objects of the conspiracy constitutes an offense. *United States* v. *Smith,* 112 F. (2d) 83, 85–86 (C. C. A. 2); *United States* v. *Koch,* 113 F. (2d) 982, 984 (C. C. A. 2).

The contention that the conspiracy statute has been misused in order to permit the imposition of a heavier sentence (Pet. 13) is unavailing (*United States* v. *Stevenson,* 215 U. S. 200, 203; *Clune* v. *United States,* 159 U. S. 590; *United States* v. *Hutto,* 256 U. S. 524, 529), as is the contention that there can be no prosecution for a conspiracy "to endeavor" to accomplish the various purposes named in the section (Pet. 13–14). *United States* v. *Russell,* 255 U. S. 138, 143.

CONCLUSION

The construction of the statute by the Circuit Court of Appeals is in accord with the undoubted intent of Congress and is in harmony with the

precedents. We therefore respectfully submit that the petition for a writ of certiorari should be denied.

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SEPTEMBER 1941.

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